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BISHOP ON MARRIAGE AND DIVORCE.[1]

Marriage was ordained of God; and the decree which established the institution was manifested in the creation of our first parents, unlike, yet adapted to each other; and in the command enjoined upon them in the garden of Eden. The manner in which this relation is assumed, differs in different ages and countries. The consent of the parties is the principal and almost only requisite to its existence. It can never be said properly to exist without that consent; and wherever such consent is manifested, either by words of present contract, or by a promise of future marriage, followed by cohabitation, the marital relation is complete, unless the statute law has expressly prescribed that such consent alone shall not constitute a valid marriage. Various learned judges have declared that consent was *ipsum matrimonium*, marriage itself.

By the ecclesiastical law, which was the only law upon the subject of marriage and divorce, "down to the middle of the sixteenth century, marriage throughout the continent of Europe was looked upon as a *consensual* contract,

[1] Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits. By Joel Prentiss Bishop. Boston: Little, Brown & Co. 1853.

capable of being completed by the parties without the interposition of spiritual authority." It appears that in the early ages of the Christian church, the only ceremony used at the solemnization of a marriage was, that the bridegroom went to the bride's house, and carried her with him to his own; and throughout Christendom there was no *religious* ceremony deemed essential to be connected with it, until the time of the Council of Trent, a little more than three hundred years ago; and in England, according to the better opinion, no ceremony at all was necessary until the time of Geo. II. If, previous to the Council of Trent, marriage was held and treated as of a sacramental character, that sacrament "might be mutually administered by the contracting parties to each other, without the aid of the sacerdotal office, or even in the presence of any one clothed in holy orders." The attendance, on the occasion of assuming the marital relation, of a minister of the church, to witness the fact, was usual, but not necessary. Yet the church constantly recommended the sanction of a religious ceremony, for the sake of greater decency and order, and because the institution itself was deemed of such sacred origin and character, that it was peculiarly fitting that Christ's body on earth, to which he had committed the keeping and witnessing of his revelations, should add its sanction to a union ordained and blessed of God himself.

"Thus stood the law," says Macqueen, "when the famous Council of Trent, assembled by the Pope, made a decree, that for the future no marriage should be effectual," unless celebrated in the presence of the parish priest and two witnesses; and this is the law in Roman Catholic countries to this day. In all Protestant countries, as before stated, whenever there is a consent to the marital relation, manifested either by words of present contract, or by a promise of future marriage, followed by cohabitation, the relation is complete, unless the statute law has expressly prescribed, that such consent alone shall not constitute a valid marriage.

In later times however, civilized nations have accompanied the assuming of the marital relation with the solemn sanctions of legal and religious ceremonies, in order to impress more deeply upon the hearts of the contracting parties, the high and sacred nature of the union into which they were entering, — a union so elevated and mysteriously

divine in its character, that it is set forth in Scripture as the symbol of the union between Christ and his holy Church.

It would be curious and entertaining, as well as instructive, to examine the various ceremonies and customs which in different ages of the world, and among different nations, have accompanied the solemnization of marriage, but it would be foreign to our purpose.

"One principle," however, says Mr. Shelford, "pervades all the different modes of celebrating marriage, which is, that the matrimonial union is in all cases to be established by consent alone, and that the formalities which the laws of different States require, are nothing more than so many modes of declaring or substantiating this consent."

When the relation is once entered into, the law of Christian countries has always held it indissoluble at the volition of the parties, and hence being established by contract and by consent, it becomes a permanent status of the parties as members of the social compact. The municipal law, moreover, either regulates, directly, all matters of property between them, or permits them to regulate these matters by their own contract, and provides penalties for infractions of their mutual obligations. In taking upon them this relation, and generally in the forms of solemnizing it, the government becomes a party to the marriage, as Mr. Bishop states the law, and determines and establishes the status of the parties.

It prohibits them from forming any other similar connections, and enjoins them to cleave to each other alone. The law does this for the good order of society, the raising up of legitimate children, whose parentage is known and acknowledged, and whose respective rights and duties, as well as those of their parents, are clearly defined, and can be readily enforced. The relation of husband and wife lies at the foundation of all society and government, and is so essential to their well-being that the law watches over it with peculiar care, and becomes a party to the contract by which it is created.

We have said, that the consent of the parties entering into the marriage relation is essentially requisite to its existence. The parties, to be capable, must be of proper age, and free from any former relation of the same kind, and from mental and physical disabilities, and not within the prohibited degrees of affinity and consanguinity. Their

consent must be obtained without force or fraud. If, therefore, there is a want of any of these qualifications or capabilities in either of them, or if the relation is not entered into according to the forms which the law renders essential to its validity, and with the mutual consent of the parties, unaffected by force and fraud, it is void or voidable, and may be declared null by the courts having jurisdiction of the matter.

The causes before mentioned, for which a decree of nullity may be made, must all exist in respect to the parties, at the time the relation is assumed, and for such causes, the canon and ecclesiastical as well as statute laws agree, that the marriage may be annulled.

In Roman Catholic countries, however, there is this difference, that the degrees of consanguinity and affinity within which marriage is unlawful have been much extended. At one time in England persons were prohibited from marrying within the seventh canonical degree, which might include the fourteenth degree of the civil law, and when persons were guilty of fornication, which was held to create a sort of affinity between the parties thereto, they were prohibited from marrying any one related to the *particeps criminis* within nearly the same degree. It was upon this last ground that Margaret, the widowed Queen of James IV. of Scotland, attempted to have her subsequent marriage with Lord Methven declared null and void. She alleged that before she married him, she had been *carnaliter cognita* by the Earl of Angus, a fourth cousin of Lord Methven. This also is said to have been one of the grounds alleged by the voluptuous and tyrannical Henry VIII. when he applied to the ecclesiastical courts of his kingdom, to annul his marriage with his ill-fated Queen Anne Boleyn. He sought this divorce, Macqueen says, "not on the ground of her alleged adulteries, but on the ground of two distinct canonical impediments, namely, her pre-contract with Northumberland, and his own pre-intercourse with her sister Mary."

If these allegations of illicit intercourse were true, according to the Roman Catholic doctrine which prevailed upon the subject at the time, these marriages were rendered voidable thereby.

The Pope, by special indulgence, might permit persons to marry within the prohibited degrees, and the sale of such indulgences became a source of immense profit to his treasury.

By the ecclesiastical law, marriage was deemed indissoluble for any cause arising *after* its solemnization, such as adultery, cruelty and desertion. For such causes the parties might be separated, but the relation of husband and wife still subsisted, and the bond of union could not be dissolved. In the ages when the Roman Church held authority over Europe, and after the famous Council of Trent, marriage was declared to be one of the sacraments of the church, and therefore indissoluble by human power.

The Pope only, as God's vicegerent on earth, could dissolve the marital relation; and this privilege of dissolution was sometimes purchased at an enormous price, and became an important source of revenue to the treasury of the pontiff.

Marriage being considered a sacrament, the courts that had jurisdiction of matrimonial causes could, therefore, only decree a separation. No matter how cruel or outrageous the conduct of one party was to the other, no matter what vicious offences were committed, or what cruelty, desertion and conjugal infidelity were suffered, the courts only relieve the parties by a divorce *a mensa et thoro* — a remedy, which Mr. Bishop very properly styles "a demoralizing mock-remedy for matrimonial ills, which in the language of Lord Stowell casts out the parties 'in the undefined and dangerous characters of a wife without a husband, and a husband without a wife;' in the language of Judge Swift 'places them in a situation where there is an irresistible temptation for the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings;' and in the language of Mr. Bancroft 'punishes the innocent more than the guilty,'" a remedy which Macqueen adds "is a sort of insult rather than a satisfaction to any man of ordinary feelings and understanding."

On the one hand was the assumed sacramental and indissoluble character of the marriage relation, and on the other the positive necessity, in many instances, of a separation for the personal safety of the party, "and therefore," as Mr. Bishop very pithily remarks, "the separation termed a divorce from bed and board, confessedly not sanctioned in Scripture, was invented as a compromise between good sense and good doctrine."

Why, we may ask, when the reasons which originated

this partial divorce are all exploded in Protestant countries, does it still remain on our statute books? Mr. Bishop, we conceive, deserves great credit for the bold and impregnable positions he has taken against it.

The doctrine of the indissolubility of the marriage relation was unknown in the Jewish and ancient Christian churches, and was never received in the Greek Church; and after the Reformation in Protestant countries "marriage ceased to be regarded as a sacrament, and this doctrine speedily fell to the ground." The reformed church rejected it, and held that for adultery, and desertion, and perhaps for cruelty and some other causes, the bond of matrimony might be sundered. But this doctrine of indissolubility, forced upon the Christian world in times of bigotry and superstition, by the Roman Church, was so incorporated into the ecclesiastical laws of England, that it still remains there unrelieved by the thousand miserable, yet sometimes practically useful subterfuges which were resorted to in Roman Catholic times, to annul the contract for original invalidity.

The English courts, therefore, can only grant divorces from bed and board, and never from the bond of matrimony. Archbishop Cranmer and his associates, appointed by Henry VIII. and Edward VI. commissioners to revise the ecclesiastical code, recommended in their report, that "the divorce *a mensa et thoro* should be entirely abrogated and done away with;" but their report failed to be adopted, by accident, not from a want of approval of their recommendation.

There is a partial remedy for this state of things in the fact, that Parliament grants the divorce from the bond of matrimony in some cases of adultery, but it is so difficult to be obtained and so expensive that it is little resorted to by the English people. In the United States, the matter is generally regulated by the statute law, and divorces from the *vinculum* of marriage are allowed for several causes; but why do we in many of the States retain that relic of another age, and of a church whose authority we disregard, the divorce *a mensa et thoro*, for any cause?

We have thus cursorily alluded to some of the leading doctrines in the laws of marriage and divorce. Mr. Bishop has gone over the whole ground in detail, in a careful and methodical manner. He has evinced great ability and research, with indefatigable labor and good judgment, while he has expressed himself in a clear and

forcible style. He has fully digested the whole law upon the subject, and illustrated the general principles which obtain in the United States in relation to it. Before his treatise, we had no American book which professed to embrace the whole law upon it. The only other relating to it is that of Mr. Page, which was confined to the states of Ohio, Indiana, and Michigan, and was published in 1850. But Mr. Bishop's is the first American book which professes to be a treatise upon the whole matter, and unless we are mistaken, it is a work that, for learning and research, method and ability, deserves to be ranked among the first law treatises of this country.

In the United States, the matter has been made the subject of legislation in probably every State of the Union, and the degrees of consanguinity and affinity within which marriage is prohibited as incestuous, the formalities by which the consent of the parties is ascertained and made manifest, the officers before whom marriage may be solemnized, the causes for which it may be annulled for invalidity in its origin, the causes of divorce both from the bond of marriage and from bed and board, and the courts which shall have jurisdiction to administer the law, which in England is done by the ecclesiastical courts, are generally settled by express statute. Those statutes, however, are held to be supplementary to the English ecclesiastical law, and not in abrogation of it, unless expressly so stated.

Mr. Bishop's clear and instructive exposition of the ecclesiastical law becomes more important, therefore, to the American student. Among the first chapters of his book, he raises the question, whether, in the United States, the English ecclesiastical law forms a part of the common law, and how far the decisions of our courts have been governed thereby. He argues with much ability and clearness, and arrives at the conclusion that that law, "so far as it undertakes to regulate the civil affairs of men," is substantially a part of the common law, which our ancestors brought with them to this country. The jurisdiction over questions depending upon matrimonial law in the United States, has been generally confided to the Equity Courts, and Chancellor Kent says, "The general rules of English jurisprudence on this subject must be considered as applicable, under the regulation of the statute, to this newly acquired branch of equity jurisdiction," and that the legis-

lature, in granting the power of divorce, "intended that those settled principles of law and equity on this subject, which may be considered as a branch of the common law, should be here adopted and applied."

Indeed, it would seem that there could be no room for doubt or question, as to whether the ecclesiastical law forms a part of onr common law, when we recollect that the language of American statutes is framed with direct reference to an existing law upon the subject. The ordinary terms employed in the ecclesiastical, are used in the statute law, without explanation or remark. When the statute speaks of a want of age or capacity in the parties, of adultery, cruelty and desertion; of recrimination or condonation, of alimony, or of divorces *a vinculo matrimonii* and *a mensa et thoro*, or any other branch of the subject, the court must necessarily refer to the ecclesiastical law for the definitions, explanations and rules of decision upon each of these matters; for the legislature is supposed to have used the language of the statute with reference to the adjudged meaning of the terms it employs. If cruelty is mentioned in the statute, and the injured party is entitled to a divorce *a mensa et thoro* therefor, as in the statutes of many of the States, the court goes at once to the ecclesiastical law, to ascertain what constitutes cruelty, and what is the precise form and effect of the divorce from bed and board.

The matrimonial law was well settled in England at the time the colonists emigrated hither, and it has been expressly decided in the English courts that such colonists take with them this law as a part of the common law of the mother country. The same rule has been generally adopted in this country, and the courts, with some few apparent exceptions, have held, that the matrimonial law of England, as far as it is applicable, in the absence of statute law, prevails here, at least in those States where the common law is the basis of their jurisprudence.

Mr. Bishop has carefully examined the English matrimonial law and practice, as well as the statutes and decisions of this country, and we think the argument and conclusion drawn from the whole, that the first forms substantially a part of the common law of this country, and prevails, or ought to prevail, as far as applicable to our institutions, unless controlled by statute provisions, is irresistible.

Mr. Bishop has also done good service in the cause of

correct legal learning in his definition of the marital relation itself. We do not know how his third chapter strikes the profession generally, but it seems to us that it places marriage upon the only clear and legal ground it can properly occupy. He has given a comparatively original definition of marriage, and has cleared the subject of much obscurity, in which the definitions and analogies of others had involved it.

His definition is bold, clear, and original, and commends itself to the common sense of the reader. He says, in substance, that marriage is a civil status, which proceeds from a civil contract. While the contract remains executory it is like other contracts, and governed by the same rules; but when the marital relation is entered into, and the contract is executed by marriage, it is merged in the status, and is governed by the law of husband and wife.

This seems to place the matter in a new light. Law writers have generally defined it to be a contract, differing, it is true, somewhat from other contracts, but still a contract — some holding it to be religious and others civil. Many distinguished jurists, among whom is Judge Story, denominate it a contract *sui generis*, *publici juris*, &c., but still treat it as a contract, though peculiar in its nature. Judge Story, it is true, after calling it a contract, says, "It appears to me to be something more than a mere contract; it is rather to be deemed an institution of society, founded upon the consent and contract of the parties." Still he has treated it as other jurists, foreign and domestic, have done before him, as a contract in the ordinary sense of that term. Mr. Bishop distinguishes the consent or contract, upon which the marital relation is based, from the relation itself, treating the first as a contract, and the last as a status, which is *juris gentium*, and in no way governed by the ordinary law of contracts. This distinction becomes very important in the United States, since the Constitutions of the several States and of the General Goverment provide that no law can be made which impairs the obligation of contracts. If marriage is to be considered as a civil contract, it will then come within the purview of the Constitutions, and great and embarrassing difficulties, such as have already arisen, will attend the administration of the laws of divorce, and produce irreconcilable decisions in the courts.

If marriage is considered what Mr. Bishop defines it to

be, a status which is *juris gentium*, the whole difficulty is avoided, and the relation may be dissolved whenever the statute law authorizes it without infringing upon the Constitution.

He has applied his definition to difficulties which exist between the English and Scotch courts, in regard to matrimonial law. It has long been a grave and embarrassing question, which has greatly agitated the tribunals of England and Scotland, how far the Scotch courts were authorized to dissolve English marriages, and under what circumstances such a dissolution would be regarded as valid either in England or Scotland.

The English courts have determined the matter one way, and the Scotch courts the other; and the House of Lords, which is the appellate court in the last resort for both countries, it appears, will decide the same question one way or the other, according to the country from which the appeal comes.

The result is, that a divorce may be good, and a second marriage valid in Scotland, but bad and invalid in England; so that, as Lord Lyndhurst has said, a man "may have two wives," one for England and another for Scotland. In regard to such a case, Mr. Bishop has ironically observed — The man "should erect his dwelling with two opposite wings for his respective wives, where the line between the two countries will divide it. Let him then put the Scotch wife on the Scotch side, and the English wife on the English side; and if the principles we are considering are adhered to, he will be in both countries equally a good citizen and a good Christian, so pronounced by one common superior tribunal."

The same state of things may exist, indeed has existed, and may be of every-day occurrence in the United States, if all the decisions of our various State courts are insisted upon as the law of the several States.

But Mr. Bishop has applied his definition of marriage, in conjunction with other well-established legal principles, to a perfect solution of the difficulty. If marriage is a civil status which is *juris gentium*, as he defines it to be, all nations must adopt one common rule to determine when the status exists. But every nation has the right, by the laws of nations, to determine and regulate the civil status of all its domiciled subjects, and therefore the common rule of all nations is to allow to parties the same status,

whether married or single, which they have in the country of their domicil, and when they remove from one country to another they carry with them to their new home, the same status which they last bore. To trace these several propositions into all their various ramifications, and to show how they reconcile all the difficulties and make a clear and illuminated way, where all was before contradiction and confusion, would extend this article beyond our present limits or intention; but the reader will find it all made plain in Mr. Bishop's two chapters, on the "Conflict of Laws, in respect to Marriage," and on the "Jurisdiction over Causes of Divorce, and the Conflict of Laws relating thereto."

The same definition and doctrines have been applied by Mr. Bishop to harmonize and remove the many difficulties and embarrassments, which beset the courts of this country in respect to "Legislative Divorces;" but we have neither time nor space to follow the subject further. He has, as we said before, rendered good service to the cause of correct legal learning in thus putting forth an original definition of marriage, and establishing its correctness by the clearness and force of his reasoning and authorities; thereby ascertaining a true basis upon which many conflicting and otherwise irreconcilable decisions in the United States may be harmonized.

To pursue our course of remarks further, would extend this article beyond convenient limits, and we are constrained to desist. Mr. Bishop has also gone fully into the doctrines and philosophy of Divorce, but we have not time nor space to point out the many excellences of the work. In preparing it for the press, he has evidently been a close and careful student, and, as we have already intimated, he has produced a treatise that, for research and ability, will rank, we think, among the first legal productions of the age.

The work is also eminently a practical one, well fitted to aid the practising lawyer in the examination and discussion of the various questions which often arise to embarrass the courts in matrimonial causes.

We commend it therefore to the profession, and to all who may wish to acquire a knowledge of the subjects it discusses. J. H. W.

NOTES TO LEADING CRIMINAL CASES.

UNITED STATES *v.* ALEXANDER DREW, (5 Mason, 28 : A. D. 1828.)

Drunkenness — Effect of — Criminal Intent.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors.

INDICTMENT for the murder of Charles L. Clark on the high seas on board of the American ship *John Jay*, of which Drew was master, and Clark was second mate. Plea, general issue.

At the trial the principal facts were not contested. But the defence set up was the insanity of the prisoner at the time of committing the homicide. It appeared, that for a considerable time before the fatal act, Drew had been in the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fear that the crew intended to murder him; and complained of persons, who were unseen, talking to him, and urging him to kill Clark; and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said, that whenever he laid down there were persons threatening to kill him, if he did not kill the mate, &c. &c. In short, he exhibited all the marked symptons of the disease brought on by intemperance, called *delirium tremens*.

Upon the closing of the evidence, the Court asked Blake, the District Attorney, if he expected to change the posture of the case. He admitted, that unless upon the facts, the Court were of opinion, that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution.[1]

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[1] See 1 Hale P. C. 29, 36; 1 Russell P. C. 11; 19 State Trials, 496; 3 Paris & Troutt, 140; Haslam on Insanity, 50; Coates, 34; Armstrong, 372; Cooper Med. Jurisp. 10; Arnold on Insanity, 67.

After some consultation the opinion of the court was delivered as follows.

Story J. We are of opinion, that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion, that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* result of the fit of intoxication, *and while it lasts;* and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

D. Davis and *Basset*, for the prisoner.

____ *Verdict, not guilty.*

The leading case of *United States* v. *Drew*, settles the

point, if it could before have been in doubt, that *insanity*, whose remote cause is habitual drunkenness, is as much an excuse for crime as insanity produced by *any cause*. But it is of drunkenness *merely*, when not amounting to insanity, in the ordinary acceptation of that word, that we propose now to treat. That voluntary drunkenness is not a sufficient excuse for crime committed while under its influence, is a principle alike of natural and municipal law.

The reason of this is thus clearly stated by Puffendorff, De Jur. Nat. & Gent., lib. 3, c. 6, § 4: — "Equidem id manifestum est, delicta ob ebrietatem, per quam patrata sunt ideo à pœnâ haudquaquam immunia esse. Scilicet quanquam fortè in ebrietate ipsa quis ignoret, quid agat; tamen ubi quis ultro voluit usurpare illa, ex quibus obnubilationem mentis orituram norât, censetur etiam in ea consensisse, quæ inde erant consecutura. Quia absolutè est interdictum, delicta admittere, ideo vitandæ quoque sunt homini occasiones, quæ probabiliter in delicta possunt pertrahere. Quid autem ebrietas designet, vix est, ut ignorare quis possit. Et cum ipsa ebrietas eo præcipue nomine sit peccatum, quatenus ad alia peccata hominem disponit; non potest ex peccatorum numero eximi, quod in se est peccatum ideo, quia peccato suam debet originem." And in our own law, Sir E. Coke, in a well-known passage, says, (Co. Litt. 247, a) — "As for a drunkard who is *voluntarius dæmon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it: *Omne crimen ebrietas et incendit, et detegit.*"

It may be questioned whether drunkenness can be properly said to *aggravate* a crime at common law, but it is abundantly settled, upon ancient and modern authority, that it is not a complete defence for any criminal act. In the old case of *Reniger* v. *Fogosa*, (Plowden, 19,) in the Exchequer Chamber, (A. D. 1551,) it is laid down, — "Where a man breaks the law by voluntary ignorance, there he shall not be excused. *As* if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding or memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. And Aristotle says that such a man

deserves double punishment, because he has doubly offended, viz., in being drunk, to the evil example of others, and in committing the crime of homicide."

So in *Beverly's case*, (4 Coke, 123,) it is said "that although he who is drunk is for the time *non compos mentis*, yet his drunkenness doth not mitigate his act or offence, nor turn to his avail." Hale's Pleas of the Crown is equally explicit — "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect, but temporary phrensy; but by the laws of England, such a person shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." (Vol. I., p. 32.) See also Russ. on Crimes, Vol. I., p. 7; Hawkins, Pl. Crown, Book I., ch. 1, s. 6; 4 Black. Comm. 26; 1 Gabbett's C. L., p. 9.

In *John Burrow's case*, (1 Lewin, C. C. 75, A. D. 1823,) the prisoner was indicted for rape, and urged as his defence, that he was in liquor. Holroyd, J., told the jury — "Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong." And Alderson, B., in *Rex* v. *Meakin*, (7 C. & P. 297, A. D. 1836,) uses the following language to the jury — "It is my duty to tell you, that the prisoner being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for."

Likewise in *Rennie's case*, (1 Lewin, C. C. 76, A. D. 1826,) an indictment for burglary, the rule was thus laid down — "Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong." Parke, B., likewise says, in *Rex* v. *Thomas*, (8 C. & P. 820, A. D. 1837) — "I must also tell you, that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he must

take the consequences of his own voluntary act; or most crimes would go unpunished."

Drunkenness is itself a crime, and was made punishable in England, as early as 1607, by the statute, 4 James I., c. 5., with a fine of five pounds, or the sitting six hours in the stocks. Blackstone remarks therefore in regard to the excuse of drunkenness, — "The law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by *another*," is well founded, notwithstanding the criticism sometimes made upon it.

In America, the same general principle has been frequently adopted. *Cornwell* v. *The State*, (Martin & Yerger, 147, 149); *Burnett* v. *The State*, (Ib. 133.)

In *The State* v. *Turner*, (1 Wright's Ohio Rep. 30, A. D. 1831,) the prisoner was indicted for the murder of his own brother. It was proved that he was intoxicated at the time. Wright, J., told the jury — "Much has been said to you about the drunkenness of the prisoner, as conducing to show that he was of unsound mind. No reliance can be placed upon drunkenness as establishing the insanity of a person which excuses him from accountability for crime. The habit of intoxication is highly immoral and vicious, tending to the destruction of the best interests of society, the severance of the dearest relations of life. He who takes an intoxicating draught voluntarily makes himself mad, and the law by reason of such madness will not excuse him from responsibility for crimes committed under its influence. If it were otherwise, the most hardened criminal would escape punishment, and the corrupt, and profligate and revengeful, would only have to intoxicate themselves to be exonerated from liability for crime, and to acquire the right to commit any act, however shocking and horrid, with impunity. In our opinion the law does not afford to bad men such protection."

The State v. *Thompson*, (Ib. 617, A. D. 1834,) is to the same effect. See also *Schaller* v. *The State*, (14 Missouri, 502, A. D. 1851.) In 1848, the question was before the Supreme Court of Alabama, on an indictment for an assault with intent to kill. The court was asked in that case to charge the jury, that "although drunkenness does not incapacitate a man from forming a premeditated design of murder, yet as it clouds the understanding and excites passion, it might be evidence of passion only, and of a

want of malice and design." This the court refused, but told the jury that "drunkenness could have no effect in their consideration." The prisoner excepted, and on the hearing in the full court, Chilton, J., declared, that it was a general rule, that although drunkenness reduces a man to a state of temporary insanity, it does not excuse him, or palliate an offence committed in a fit of intoxication, and which is the immediate result of it; and that if the prisoner had killed the deceased with the deadly weapon (a knife) with which he stabbed him in a state of intoxication, the crime would not have been reduced from murder to manslaughter by his intoxication, which must be presumed, in the absence of contrary evidence, to be voluntary; and the Court remark upon the cases of *Pennsylvania* v. *Nutall*, (Add. 257,) and *Swan* v. *The State*, (4 Humph. 136,) that there it was important to ascertain whether the homicide was that "*wilful, deliberate, malicious and premeditated killing*," which by the statute constituted murder in the first degree. The mental state required for that crime being one of deliberation and premeditation, the fact of the prisoner's drunkenness was material, not as an excuse for the crime, but to show it had not been committed. *The State* v. *Bullock*, (13 Alabama, 413, A. D. 1848.) Possibly this case may have gone too far in refusing to allow drunkenness to be given in evidence upon the question of intention.

The Supreme Court of North Carolina has declared the same law. In 1848, a prisoner was indicted for murder. One defence was drunkenness. The judge told the jury, that drunkenness would not lessen the prisoner's guilt, if they believed he was sane before he became drunk. A new trial being moved for on the ground of misdirection, Battle, J., said, "All the writers on the criminal law, from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man otherwise sane, while acting under its influence. Even the cases relied on by the counsel for the prisoner, *Rex* v. *Meakin*, (7 C. & P. 297,) *Rex* v. *Thomas*, (Ibid. 817,) 1 Russell on Crimes, 8, all acknowledge the general rule, but they say that when a legal provocation is proved, intoxication may be taken into consideration to ascertain whether the slayer acted from malice, or from sudden passion excited by the provocation. Whether the distinction is a proper one or

not, we do not pretend to say. It has been doubted in England, *Rex* v. *Carroll*, (7 C. & P. 145,) and it is a dangerous one, and ought to be received with great caution. But whether admitted or not, it has no bearing upon the present case. There is not a particle of testimony to show that the prisoner was acting, or can be supposed to have been acting, under a *legal* provocation; and there was therefore no cause for the application of the principle for which the counsel contends." *State* v. *John*, (8 Ired. 330.)

The case of *Pirtle* v. *State*, (9 Humphreys, 663, A. D. 1849,) is an important case on this point. The defendant was indicted for murder. At the time of the commission of the offence he was intoxicated from the use of ardent spirits.

"And in relation thereto the judge charged the jury, 'that the fact of such drunkenness could not be taken into consideration by them, unless the defendant was so far gone, as not to be conscious of what he was doing, and did not know right from wrong.' "Out of this charge," said Turley, J. "arises the point to be considered by the court in this case, and that is, how far drunkenness, in law, is a mitigation or excuse for the commission of offences.

"This is no new question, presented for the first time for consideration, but one of the earliest consideration in the law of offences; one which has been again and again adjudicated by the courts of Great Britain, and the United States, and, as we apprehend, with a consistent uniformity rarely to be met with in questions of a like interest and importance. Upon the subject we have nothing to discover, no new principle to lay down, no philosophical investigation to enter into, in relation to mental sanity or insanity, but only to ascertain how the law upon this subject has been heretofore adjudged, and so to adjudge it ourselves."

"In the case of *Cornwall* v. *The State of Tennessee*, (Mar. & Yer. 147, 149,) the able judge who delivered the opinion of the court, in speaking upon this subject, uses the following very emphatic language: 'A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend to virtue, peace, quietness and good government. All civilized governments must punish the culprit who relies on so untenable a defence; and in doing so they preach a louder lesson of morality, to all

those who are addicted to intoxication, and to parents, and to guardians, and to youth, and to society, than comes in the cold abstract from pulpits.' To the justice and correctness of these remarks, all who have had experience in the annals of crime can bear testimony. It is only at the present term of the court that we have seen it proven, that an offender, a short time before the perpetration of a horrid murder, inquired of a grocery-keeper, what kind of liquor would make him drunk soonest, and swallowed thereupon a bumper of brandy. We have had three cases of murder, and one of an assault with intent to murder, before us at this term of the court, in every one of which there were convictions in the Circuit Court and affirmances in this; every one of which is of aggravated character, and in every one of which the perpetrator, at the time of the commission of the offence, was laboring under *dementia affectata*, drunkenness; an awful illustration of the necessity of holding to the law, as it has been adjudged upon this subject. There is, in our judgment, no conflict of authority upon this point of law; every case which may have such appearance being a case of exception in the application of the rule, or a case of no authority upon the subject. Lord Hale in his work before referred to, (P. C.) part 1, ch. 4, says: 'If by means of drunkenness, an habitual or fixed madness be caused, that will excuse, though it be contracted by the vice and will of the party; for this habitual or fixed phrenzy puts a man in the same condition, as if it were contracted at first involuntarily.' And it was to this principle the Circuit Judge was alluding when he charged the jury in the present case, that the drunkenness of the prisoner could not be taken by them into consideration, unless he were so far gone as to be unconscious of what he was doing, and did not know right from wrong; in saying which he put the case most favorable for the prisoner, for a man may be so intoxicated as to be unconscious of what he is doing, and not to know right from wrong; and yet not have contracted an habitual and fixed phrenzy, the result of intemperance, of which Lord Hale is speaking above."

In Kelley v. *State*, (3 Smedes & Marshall, 518, A. D. 1844,) the same question came before the High Court of Errors and Appeals of Mississippi. The court below declined to charge the jury that intoxication was evidence of intention, in determining whether the killing was murder. The prison-

er was convicted of manslaughter only, but the court above, in remarking upon this question, lays down the law as well established, that drunkenness is no excuse for crime, although sometimes held proper for consideration where the sole question is whether the act done was premeditated, or done only with sudden heat and impulse, which might be as truly said of anger or any other excitement arising from sudden provocation or peculiar circumstances; but not much importance was to be attached to it, as might be conceived from the presumption, which was equally great, that the design might have previously existed, and intoxication have been employed to nerve the criminal to the commission of the crime; that the law discriminates between the delusion of intoxication and the insanity which it may ultimately produce. If drunkenness, they said, were to be considered an excuse for crime, there would be established a complete emancipation from criminal justice.

So in *United States* v. *Clarke*, (2 Cranch, C. C. R. 158, A. D. 1818), "The prisoner was indicted for the murder of his wife, by shooting her with a musket upon her return home in the evening from church.

Mr. Key, for the prisoner, prayed the court to instruct the jury, that if they should be satisfied by the evidence that the prisoner, by long and settled habits of intemperance, had become disordered both in body and mind, and subject to fits which affected both his mind and body, and that by reason thereof he was generally, and at all times, when not under the influence of liquor of unsound mind, then the prisoner could not be found guilty of killing the deceased with malice; which instruction the court, (*nem. con.*) refused to give, but instructed the jury that if they should be satisfied by the evidence, that the prisoner, at the time of committing the act charged in the indictment, was in such a state of mental insanity not produced by the immediate effects of intoxicating drink as not to have been conscious of the moral turpitude of the act, they should find him not guilty."

And he was found guilty and sentenced to death.

In like manner in *United States* v. *James McGlue*, (1 Curtis's C. C. Rep. 1, (not yet published) it was held that, if a person while sane and responsible, makes himself intoxicated, and while in that state commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants of that state, he is

responsible. But if he is suffering under *delirium tremens*, and is so far insane as not to know the nature of the act, nor whether it was wrong or not, he is not punishable, although such *delirium tremens* is produced by the voluntary use of intoxicating liquors.

But although drunkenness is not *itself* a *complete defence* for crime, as insanity is, yet it may be admissible to the jury as evidence of the *intent* in certain cases, with which the act was done. Thus in *Regina* v. *Moore*, (at the Sussex Summer Assizes, 1852, before Jervis, C. J.), the prisoner was indicted for a misdemeanor in attempting to commit suicide by throwing herself into a well. The evidence was, that she was at the time so drunk she did not know what she was doing. Jervis, C. J., told the jury, "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?" and she was acquitted. And in *Marshall's case*, (1 Lewin, C. C. 76, A. D. 1830,) where the prisoner was indicted for stabbing, Parke, J. told the jury that they might take into consideration, among other circumstances, the fact that the prisoner was drunk at the time, in order to determine whether he acted under a *bonâ fide* apprehension that his person or property was about to be attacked. And *Goodier's case*, in 1831, is said to be the same way before another judge.

So in *Regina* v. *Cruse*, (8 C. & P. 541, A. D. 1838) on an indictment for inflicting a dangerous wound, with *intent to murder*, under Stat. 1 Vict. 85, § 2, and where a positive intention of murdering was essential to make out the particular offence charged, Patteson, J., instructed the jury that although drunkenness is no excuse for any crime, yet it is often of very great importance, in cases where it is a question of intention. "A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners or either of them had formed a positive intention of murdering the child, you may still find them guilty of an assault." And the jury found the prisoners guilty only of an assault.

On the same principle it was held in *Pigman* v. *The State*, (14 Ohio, 555, A. D. 1846), that on an indictment for passing counterfeit money, knowing it to be counterfeit, the drunkenness of the prisoner at the time of passing, was proper for the consideration of the jury, in

determining whether he *knew* the bill to be counterfeit; and Read, J., ably and clearly expounded the principles upon which the evidence was considered admissible.

And this principle has been carried somewhat farther both in England and this country. In *Rex* v. *Thomas*, (7 C. & P. 817, A. D. 1837,) the prisoner was indicted for maliciously stabbing. One defence was a provocation from the injured party, which was urged as reducing the offence, as the blow was inflicted through momentary passion, and not through malice. The prisoner had also used some threatening expressions while in liquor, and Parke, B., in in summing up, said:

"I must also tell you, that if a man makes himself voluntarily drunk, that it is no excuse for any crime he may commit whilst he is so; he must take the consequence of his own voluntary act; or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. You will decide whether the subsequent act does not furnish the best means of judging what the nature of the previous expression really was."

The same principle was recognised in this country in *State* v. *McCante*, (1 Spears, 384,) being somewhat differently applied. The court here held, "That if a crime was committed upon a provocation which, if acted upon *instantly* by a sober man, would mitigate his offence, evidence of intoxication was admissible upon the question whether such provocation was in fact acted upon when the act was done. If a man uses a stick upon you, you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon. But where a

dangerous instrument is used which, if used must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."

So in *Rex* v. *Meakin* (7 C. & P. 297, A. D. 1836,) also an indictment for stabbing with intent to murder, Alderson, B., instructed the jury: "With regard to the intention, drunkenness may be, perhaps, adverted to, according to the nature of the instrument used." In this country, in *Pennsylvania* v. *Fall*, (Addison, 257, A. D. 1794,) the prisoner was indicted for *murder;* he was drunk at the time of the act. The court left it to the jury whether there was that premeditated malice and design necessary to constitute the crime of murder. "Drunkenness," said the President, "does not incapacitate a man from forming a premeditated design of murder, but frequently suggests it. But as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design."

Swan v. *The State*, (4 Humph. 136, A. D. 1843,) is a strong case upon this point. The prisoner was convicted of murder in the *first degree.* His counsel had requested the court to charge, as matter of law, that drunkenness would reduce the crime of murder in the first degree to murder in the *second degree.* The court said, in effect, that drunkenness is no excuse or justification for any crime, and upon exceptions to this ruling, Reese, J., said: "The legal correctness of the general statement of the court is abundantly sustained by a long and unbroken series of authorities in ancient and modern times;" but that when the nature and essence of the crime depends by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act, drunkenness, as affecting such state and condition, is proper for the consideration of the jury. The question then is, What is the mental status? Did the act proceed from sudden passion, or from deliberation and premeditation? If the mental state required by law is one of deliberation and premeditation, and drunkenness or any thing else excludes the existence of such a state, then it does not excuse the crime, but shows that that crime has not been committed.

This decision was subsequently explained by the same court in *Pirtle* v. *The State*, (9 Humph. 570, A. D. 1849) as follows:

"This reasoning is alone applicable to cases of murder

under our act of 1829, chap. 23, which provides 'That all murder committed by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree.' Now this is drawing a distinction unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by confinement in the penitentiary. In order to inflict the punishment of death, the murder must have been committed wilfully, deliberately, maliciously and premeditately; this state of mind is conclusively proven when the death has been inflicted by poison, or by lying in wait for that purpose; but if neither of these concomitants attend the killing, then the state of mind necessary to constitute murder in the first degree, by the wilfulness, the deliberation, the maliciousness, the premeditation, if it exist, must be otherwise proven; and if it appear that there was sudden provocation, though not of such a character as at common law to mitigate the offence to manslaughter, and the killing thereupon takes place by sudden heat and passion, and without deliberation and premeditation, although the common law would presume malice, yet it is under the statute murder in the second degree, and not to be punished by death.

Then it will frequently happen necessarily, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison, or by lying in wait, that it will be a vexed question whether the killing has been the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of deliberation and premeditation; and in all such cases, whatever fact is calculated to cast light upon the mental status of the offender is legitimate proof; and among others, the fact that he was at the time drunk, not that this will excuse or mitigate the offence if it were done wilfully, deliberately, maliciously, and premeditatedly; (which it might well be, though the perpetrator was drunk at the time,) but to show

that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation. This distinction never can exist except between murder in the first and murder in the second degree under our statute. It is upon such distinction, the remarks of the judge in the case of *Swan* v. *The State*, are based, and by it they are to be confined. Thus far we recognise their justness, but can extend them no further.

If a drunken man commit wilful, deliberate, malicious, and premeditated murder, he is in legal estimation guilty as if he were sober. If he do it by means of poison knowingly administered, or by lying in wait, these facts are as conclusive evidence against him as if he had been sober. If from the proof, in the absence of such lying in wait, or administering of poison, it shall appear, that the killing was wilful, deliberate, malicious, and premeditated, he is guilty as though he was sober. But in ascertaining the fact of such intention, all the concomitant circumstances shall be heard, in order to enable the jury to judge, whether such deliberate, wilful, malicious, and premeditated design existed, or whether the killing was not the result of sudden heat and passion, produced by a sudden and unexpected controversy between the parties, but of such a character as not to mitigate the slaying to manslaughter. As between the two offences of murder in the second degree, and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offence a drunken man is equally responsible as a sober one."

And in the still later case of *Haile* v. *The State*, (11 Humph. 154, A. D. 1850,) the same question was again before the Court. There "the plaintiff in error was indicted for murder, and found guilty of murder in the first degree. There was evidence on the trial that he was intoxicated at the time of the homicide, and the court instructed the jury that voluntary intoxication was no excuse for crime, rather an aggravation; yet if the prisoner was so intoxicated as to be unable to form a design de-

liberately and premeditatedly to do the act, the killing would be only murder in the second degree."

The court then quote and comment upon the previous cases of *Swan* v. *The State*, and *Pirtle* v. *The State*, and state the rule, as declared by the last case, to be, that where the question is between murder in the first and second degree, drunkenness may be proved to show the mental status of the offender, and enable the jury to determine whether the act sprung from a premeditated purpose, or from passion excited by inadequate provocation; and that the degree of drunkenness which may shed light upon this mental status is not alone such excessive intoxication as incapacitates the party to frame a design deliberately and premeditatedly to do an act. But that drunkenness cannot be taken into consideration in determining whether a party be guilty of murder in the second degree. The court were of opinion that, as to murder in the first degree, deliberation and premeditation was a matter of fact to be found by the jury, as to which the influence of intoxication upon the mind was matter for their consideration. And they held the instruction of the court below erroneous in stating that it was an aggravation of the offence unless so great as to incapacitate the accused from forming a design deliberately and premeditatedly to do the act charged.

In *Rex* v. *Grindley*, (1 Russell on Crimes, p. 8, note n,) Holroyd, J., is reported to have ruled that where on a charge of murder the material question is, whether an act was premeditated, or done only with sudden heat and passion, the jury might consider the fact that the party was intoxicated; but this was subsequently denied to be law. In *Rex* v. *Carrol*, (7 C. & P. 145, A. D. 1835,) which was an indictment for murder, Parke, J., said: —

"Highly as I respect that late excellent judge, I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion. There is no doubt that that case is not law. I think that there would be no safety for human life if it were to be considered as law."

The case has also been denied in this country, in *Pirtle* v. *The State*, supra, where Turley, J., said: —

"The case of *Rex* v. *Grindly*, decided at Worcester, Sum. Ass., 1819, by Holroyd, J., not reported, but referred to by Russell in his work upon crimes, page 8, and now insisted upon by the prisoner as putting the Circuit Judge

in the wrong in his charge to the jury, and holding different principles upon this subject, is expressly overruled by Park and Littledale, judges, in the case of *Rex* v. *Carroll*, (7 C. & P. 145); and if it were not, it is an anomalous case; and perhaps was not intended or considered by Holroyd, to be in conflict with principles so well and so long settled. The case, as stated by Russell, holds that 'though voluntary drunkenness cannot excuse from the commission of crime, yet when upon a charge of murder, the material question is whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration.' Now, in relation to this principle as thus laid down, it may be observed that cases may arise, even of murder at common law, in which it would be proper to receive such proof as explanatory of intention. To constitute murder at common law, the killing must have been done with malice aforethought; the existence of this malice, necessarily implies the absence of all circumstances of justification, excuse or mitigation arising from adequate provocation; and this malice is either express or implied; express, when it has been perpetrated by poison, lying in wait, or other deliberate and premeditated manner; implied, from the nature of the weapon, the violence of the assault, and the inadequacy of the provocation. It may become important in a case to know whether poison which has been imbibed, was administered knowingly and designedly, or accidentally; and if it be wilful, which it is in the case of the administration of a medicine, there being two on the table, one a poison, the other not, and the poison be administered, is not the fact that the person who administered it, was drunk at the time, legitimate proof for the purpose of showing, that it was a mistake which a drunken man might make, though a sober one would not? This would be not to protect him from the punishment for his crime, but to show that he had not given the poison premeditatedly, and therefore was guilty of no crime. So if the question be whether the killing is murder or manslaughter, the defence being adequate provocation, and it be doubtful whether the blow be struck upon the provocation or upon an old grudge, it seems to us proof that the prisoner was drunk when he struck the blow is legitimate, not to mitigate the offence, but in explanation of the intent, that is, whether the blow was struck upon the provo-

cation, or upon the old grudge; for the law only mitigates the offence to manslaughter, upon adequate provocation, out of compassion to human frailty; and therefore, though there be adequate cause for such mitigation, yet if in point of fact, one avail himself of it to appease an old grudge, it is murder, and not manslaughter; and in all such cases the question necessarily is, whether the blow was stricken premeditatedly, or upon the sudden heat and impulse produced by the provocation, and the fact of the self-possession of the perpetrator of the crime, is very material in a conflict of proof upon the subject. If this be the extent of the opinion of Holroyd in the case of *Rex* v. *Grindly*, we are not prepared to hold that it is not law. But if it be understood to hold that a killing may be mitigated from murder to manslaughter, in consequence of the drunkenness of the perpetrator, thereby making that adequate provocation, in the case of a drunken man, which could not be so in the case of a sober one, we are prepared to hold with Park and Littledale, that it is not law."

Dr. Ray has very ably and fully discussed the general question of criminal responsibility in cases of drunkenness, and of insanity arising from drunkenness, in his work on "The Medical Jurisprudence of Insanity." See the chapter on "Drunkenness" in that work, p. 435.

E. H. B.

Recent American Decisions.

Circuit Court of the United States for the First Circuit, Massachusetts District, October Term, 1853.

JOSEPH IASIGI et al. *v.* JAMES BROWN.

Representations of Credit, &c. of Third Person — Actions on — Confidential Letter.

A person who receives a letter marked "Confidential," has *primâ facie* no authority to exhibit it to any third person; and if so exhibited, no action can be sustained by such third person on account of any representations contained in the letter, as to the credit, &c. of another party, without other evidence to show authority from the writer to exhibit the letter.

As to evidence upon which a jury would not be warranted in finding such authority.

This was an action on the case brought by Messrs. Iasigi & Goddard, of Boston, against Mr. James Brown, of New York, the senior member of the firm of Brown, Bro's & Co., Bankers, in which the plaintiffs alleged that Mr. Brown had made certain false and fraudulent representations to them respecting the solvency of Messrs. Thompson & Co., and Orrin Thompson, of New York, and two factories in Connecticut, known as the Thompsonville, and Tariffville Manufacturing Companies, by means of which the plaintiffs were induced to sell wool to a large amount (about $25,000) to these parties on credit, which sum the plaintiffs wholly lost by reason of the subsequent failure of the Messrs. Thompson and the factories. The alleged false representations were contained in a letter addressed by Mr. Brown to Mr. T. B. Curtis, the agent and correspondent of the defendant's house in Boston, which the plaintiffs averred the defendant intended should be exhibited to them for the purpose of inducing them to give a false credit to the said parties. The defendant contended that his letter was written in entire good faith, was addressed to his agent as a confidential letter, and that Mr. Mr. Curtis had no authority to exhibit, or the plaintiffs to read it. The evidence upon this point, which was the one on which the case was decided, was in substance as follows.

T. B. Curtis, called by the plaintiffs, testified that in April, 1851, he was the agent of the defendant's firm; that Iasigi came to him, stating that he had a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson; that Austins & Spicer, in New York, had recently failed, by which he thought the factories or Thompson or both, would lose money, and that he felt anxious as to the fate of the paper he held; that Iasigi said Brown was a friend of Thompson, and he had himself heavy dealings with him, and wished witness to write to the defendant and ask him about the standing of Thompson and his property; that witness accordingly wrote the following letter to Mr. Brown.

"James Brown, Esq. *Boston, April* 5, 1851.

Dear Sir, — I have your note of yesterday, but have had scarcely a moment to peruse it this morning. My object at the present moment is to ask your opinion as to any possibility of loss by selling largely to the Thompsonville Co. or Orrin Thompson. Whatever that opinion may

be, it will be discreetly used by myself. I also want your views as to the unlooked for high exchange on England. To what cause is it attributable? Has the influx of gold from California any thing to do with it? Is the exchange likely to be lower? I am delighted with the success of the Baltic. Yours faithfully, THOS. B. CURTIS.

Please give me a line about the Thompson concern on Monday."

A reply to which was received by him. The plaintiffs' counsel asked him to produce the letter. To this he objected, on the ground that it was confidential. The plaintiffs' counsel asked how he knew it was confidential, to which he answered that all he knew was by the writing itself and the circumstances; that all he said was that it was a confidential letter; that when he wrote to Mr. Brown he did not let him know the information was for any one else than himself. But the letter, of which the following is a copy, was admitted.

"CONFIDENTIAL.

T. B. Curtis, Esq. *New York, 7th April, '51.*

Dear Sir, — With respect to Thompson & Co., and Orrin Thompson, I have to say that our house have done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company, and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austins & Spicer, they were unfortunately on their paper (received for sales of carpets for $183,000); this threw suddenly so heavy a burden on Thompson & Co., that Messrs. Hicks & Co. and ourselves looked into their affairs; and feeling that they had an abundance to pay every one, and have a handsome sum left if they continued their business, we jointly advanced the money to pay their indorsements as they came round, for which advances we have security. In order, however, to relieve them from the necessity of borrowing and needing more cash capital, to carry on the business comfortably, both the companies alluded to owing Messrs. Thompson & Co. each about $375,000, making together $750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for $750,000, to secure the payment of those bonds, which are payable in six, eight, and ten years.

A gentleman goes over to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiation of these bonds and the securities held would pay off all the advances made by ourselves, Messrs. Hicks & Co. and W. S. Wetmore, who also made them some advances. From Mr. Thompson's statement of the business of the factory they are doing a good, nay a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run.

If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother William to take from 60 to $100,000 for himself and for me, at whatever rate they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will also take some of them. Since the failure, Thompson & Co. have laid their hands on Austins & Spicer's property to the extent of $50,000, reducing the risk to $123,000, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth $400,000, any loss that can now occur by Austins & Spicer does not hurt him much. All they want is the negotiation of the bonds to make them move on with perfect comfort.

I have no doubt the influx of California gold has been one cause of increased importations, and the gold must go to pay for them, &c. &c. Yours truly,

(Signed) James Brown."

"The answer was due," Mr. Curtis stated, "on the 8th of April, and on that day Mr. Iasigi came to me and asked if I had a reply. I told him I had a confidential answer. He begged me to let him see it, and persuaded me to do so, and I showed it to him. My reply to him was that I had a confidential answer; he said he hoped I would let him see it, and I showed it to him. There was no one with him at the time. * * * * *

He then asked me to let him take the letter to show it to his friend Mr. S., with whom he said he always advised. I again said the letter was confidential, and that I could not suffer it to go out of my office. He then said, 'Will you let Mr. S. see it here,' repeating that he always advised with S. on matters of importance, and he wanted him to see it. On this solicitation I consented, and S. came with Iasigi and read the letter."

* * * * * "We were neighbors and friends. I was led to ask this information, and to communicate the result to him, in consequence of the friendly relations that had long subsisted between us; and further, because I thought it would tend to relieve Mr. I.'s mind, and not with any view to future sales. If it had not been for that state of facts I should not have shown him the letter."

* * * * "Mr. Brown never authorized me to exhibit the letter to any one. I don't know when Mr. Brown first knew that the letter had been shown to any body. Don't know that he knew it till after the failure of Thompson & Co."

In the month of May Mr. Iasigi relying, as he claimed and offered to prove, upon these letters, made sales to the factories for notes indorsed by Thompson to the amount of about $25,000, which he lost by their failure in the autumn of 1851.

In June Mr. Curtis wrote the following letter to Brown, Brothers & Co., in relation to the Thompsonville Factory, at the request of Mr. Patrick Grant, who had been applied to, to sell wool to that company, and had consulted Iasigi.

"*Boston, 26th June*, 1851.

MESSRS. BROWN, BROTHERS & Co., of New York.

Gentlemen: Your favor of 25th inst. is received, and your remarks have my attention.

Nothing in my letters from Liverpool to report. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Co.? I replied that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern? There being several among my friends here who have heretofore sold them wool and wish to continue to do so.

Yours faithfully, (Signed) THOS. B. CURTIS."

To which the following reply was received.

"THOMAS B. CURTIS, Esq. Boston. *New York, 27th June*, 1851.

Dear Sir: We are in receipt of yours 26th inst.; contents noted.

We continue to have a favorable opinion of the concern you allude to.

No change in our views about exchange.

We are your friends, (Signed) BROWN, BRO'S & Co."

R. F. Wyman testified that in April, 1851, he applied to Mr. Curtis in regard to this company. Curtis said he

would make inquiries, and told him afterwards that he had made them, and they were considered good.

Mr. Grant testified, that after the failure of the parties in Connecticut he went to New York, where Iasigi and himself had an interview with Messrs. James and Stewart Brown, in which the letters of April 7, and June 27, were the basis of conversation. Mr. James Brown did not say that the last was written without his knowledge or approbation. Mr. Grant said he went to see as to the failure of the Thompsonville Co., so far as he was concerned, and to show, as he hoped to do, to Brown, Brothers & Co., that there was a moral responsibility on their part to respond to these notes. The April letter was very fully discussed. Mr. Iasigi stated that he had applied to Curtis to know with respect to the Thompsonville and Tariffville Co's, and Orrin Thompson, to know what their credit was, and whether it would be safe to sell to them. He connected Grant with the April letter, although, as Grant now testified, he had nothing to do with that, but that he did not then state that to Mr. Brown. Iasigi then alluded to the letter written for Grant. Copies of the letters were there, but Mr. Grant thought they were not produced. Both were distinctly referred to, distinctly recognised and commented on, and their various parts distinctly discussed. Iasigi commented on his own and Grant's transactions, and said they had sold on the faith of these letters; and as all the property of the companies and Thompson had apparently been attached by Brown, Brothers & Co., they (the claimants) ought, in a moral point of view as to responsibility, to share part and parcel with those who had attached. Mr. Brown said the letter of April 7th was a guarded one, and that as to the second letter, that was nothing but a statement that "we continue to have a favorable opinion of the concerns." That the connection of his firm with Thompson had been of a long date; that they had had a great number of transactions together, and that at the time the April letter was written, that they had intended to carry Mr. T. through, but that Thompson had deceived them. He repeated several times that this was a guarded letter; and as it was written in entire good faith, and as they had lost much more than Iasigi and the others subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them. Stewart Brown said, "If you had called on us, gentlemen, and conversed with us instead of

writing, you would not have sold this wool." That when the letters were written they intended to carry Thompson & Co. through; as they found they could not, the letters were guarded; that the parties ought not to have sold on them. He conveyed the meaning, that, if they had called personally, matters would have been explained more fully, and they would not have sold. The letters were written under the feeling that these people were not very strong. That inference was very plain, the witness said, from what he stated; and also, that he meant them to understand that the April letter was very guarded, and that they ought not to have sold on the faith of it.

The moral responsibility of the firm was the particular topic when they said the letters were guarded.

The principal conversation was on their moral responsibility as based on the two letters. The claim against them was put on the contents of the letters; and the accompanying facts that they had all the property. Mr. G. also said that no suggestion was made by any one at the interview, that the letter was confidential, or had been improperly shown.

The plaintiffs also offered to prove that certain statements in the letter of April 7th, material to show the property and credit of said Thompsonville Co., said Tariffville Co., and of Thompson, and the safety and expediency of selling them goods on credit, and to influence the judgment of one reading the letter in regard to such sale, were false, and known to the defendant to be so when the letter was written, and were then known to him to be material to show the credit and property of those parties, and the safety and expediency of selling to them on credit. Also, that in said letter the defendant did intentionally suppress and conceal facts which he knew, and knew to be material to show their property and credit, and the safety and expediency of selling as aforesaid, and which would materially qualify and change the statements in the letter, and make them in material respects less calculated to influence the judgment in favor of crediting them; and that within thirty days before April 7th, the defendant alone and jointly with one Hicks, had taken conveyances in mortgage, or absolutely, of all Thompson's property, real and personal, with some small exceptions, to the amount of $188,000, as security for the debts and liabilities of Thompson & Co. to defendant's house and to said Hicks, amounting to over $509,000; also that defendant was

largely interested, pecuniarily, to sustain the credit of Thompson and the factories, and to induce extensive sales to them on credit. And this evidence was offered generally in support of the action, and also to show that the defendant wrote the letter with the fraudulent intent stated in the declaration, and that it should be shown to other persons than Mr. Curtis, to induce them to sell to those parties on credit. And the plaintiff proved that he made the sales stated in his declaration, relying on and trusting to and in consequence of the letter of April 7th.

A great deal of testimony was put in, and the foregoing is somewhat condensed and transposed; but taken in connection with the opinion of the court, it is hoped that enough has been stated to present with distinctness the question of law raised in the case. Nor is it deemed necessary to give at length such portions of the evidence as appear from the opinion of the court, or were excluded upon any general principle which indicates their nature.

The defendant contended that upon the plaintiffs' own evidence, which they had introduced and offered to introduce, the jury would not be warranted in finding that defendant ever gave any authority to Mr. Curtis to exhibit his letter of April 7th to the plaintiffs, or that he intended that it should be so exhibited to or read by the plaintiffs, or any other person than Mr. Curtis himself; that the jury consequently could not find that the defendant had ever made any representation to the plaintiffs, and therefore that the action could not be maintained.[1]

This question was argued by counsel, and subsequently the following opinion was delivered by

Sprague, J. The questions presented in this case are important, and I am not surprised that the ablest counsel should differ widely respecting them. I have given to them all the consideration which the time has allowed during the progress of a jury trial, and will now state the conclusion to which I have arrived, and the reasons upon which it is founded. In the present position of the case, the question is *first*, what the jury would be authorized to

[1] It is proper to state, in justice to the defendant, that while relying for the present upon the ground above stated, he alleged that he was fully prepared to prove that the letter was written in good faith by him, and that it was a candid statement of all the facts affecting the credit of these parties known to him at the time, and that he, relying upon their solvency, had made advances to them to a very large amount after writing the letter, which he lost by their failure.

find, by the evidence, as matter of fact, and *secondly*, whether the facts they would be authorized to find would be sufficient to sustain the action. And first: the action is founded entirely on the letter of the 7th of April, and the material question is, as to the authority of Mr. Curtis to exhibit it. It is not contended that Mr. Curtis did not act with entire good faith to the plaintiffs or other third parties. There is nothing in the evidence to warrant the jury in finding the contrary, for this rests entirely upon his testimony; and there is no evidence there certainly, that he did not act in entire good faith to the plaintiffs. The question, then, is this, whether Mr. Curtis did, in fact, have authority to exhibit this letter to the plaintiffs. It is admitted by the counsel that if the jury could find that he had, the cause must be put to them, and on the other hand, if the jury must find that he had no authority, then there was no ground to sustain this action. So, then, the inquiry really is, whether, upon the evidence introduced and offered, the jury could find, agreeably to principles of law, that Mr. Curtis had authority to exhibit the letter.

And the first remark is, that all the authority conveyed to Mr. Curtis for the exhibition of the letter, is the letter itself. There is no evidence of any personal communication between Mr. Curtis and the defendant, or with another person as defendant's agent, or by any other means than the letter itself. And the question is, what authority did that letter give him to exhibit it? It is a question of the construction of a written instrument to be aided, undoubtedly, by surrounding circumstances; but the question is this, whether the letter, read by the light of all the surrounding circumstances, conveyed to Mr. Curtis any authority for its exhibition to another party.

In the first place, look at the letter. And here as to the province, respectively of the court and the jury. It is equally the duty of the court not to withdraw from the jury any thing proper for their determination; and, on the other hand, not to throw upon them the responsibility of a question which it is the duty of the court to decide. The general rule of law is — that written instruments are to be construed by the court and not by the jury. This is a written paper, and, by the general rule, to be decided upon by the court. But there may be extrinsic circumstances to be taken into view, in construing all such documents; there may be technical terms and expressions used by one

or another class of persons, intelligible to such class, though perhaps not generally. In such case the facts bearing upon the construction are matters to be ascertained by a jury. But when there are no such extrinsic facts, or no such technical terms, then it becomes the duty of the court peremptorily to decide as to the meaning of the writing — its construction and effect.

Questions may sometimes arise as to the mercantile or commercial meaning attached to terms of trade. But here there is no evidence whatever of any meaning of the words, different from the ordinary, usual one known to the community and presumed to be known to the court. It is argued for the plaintiffs that the term *confidential*, as between bankers, merchants, and the like, has a meaning different from the ordinary one, but no evidence has been offered to show that such is the case. There is evidence offered of extrinsic circumstances going to prove, as the plaintiffs aver, that Mr. Curtis had authority to exhibit this letter, and this will be examined hereafter. But let us, in the first place, proceed to consider the letter itself.

It must be taken in connection with that of the 5th of April from Mr. Curtis. That, also, is a written paper, and its construction belongs to the court and not to the jury. In the letter of the 5th, Mr. Curtis asks as the defendant's opinion of the danger or risk of selling largely to those parties, and then adds, that whatever that opinion may be, "it will be *discreetly* used by myself." In answer, the defendant immediately writes, beginning his letter with the word "confidential." He then goes into a statement of the relations and dealings between himself and the said concerns; states certain facts; and expresses an opinion as to their ability to pay, and the danger of loss by trusting them.

Now, the question before the court, in looking at the letters, is as to the force and effect of the word "confidential," in the letter of the 7th of April, as taken in connection with the first letter of the 5th of April, and the surrounding circumstances. It is written immediately after in answer to the inquiry of Mr. Curtis, and it will be observed that Mr. Curtis promises that whatever may be the opinion of Mr. Brown, it will be "discreetly" used by himself. This, if the word "confidential" were omitted from the reply, would leave the matter to Mr. Curtis's discretion, and it is argued that the use of that term does not neces-

sarily restrict the letter to Mr. Curtis's own use. If it (the word "confidential") were left out, I do not think the letter would be restricted to Mr. Curtis's own private business, but the letter would be intended to be used by him discreetly in relation to questions regarding the solvency of the concerns spoken of. But the defendant does not content himself merely with the promise of Mr. Curtis to use the defendant's opinion discreetly, but superadds a restriction of his own — he marks his letter "confidential" and the question is — What is the meaning of that word? I apprehend that it cannot be, as the learned counsel for the plaintiffs have contended, that it means that Mr. Curtis is to be discreet as to whom he shall exhibit the letter, for the defendant had that promise in the letter from Mr. Curtis; he was not content with that promise, but marks his reply "confidential." And now can it be said that a person receiving a communication bearing "confidential" on the face of it, is at liberty, at his own discretion, to show it to every body or any body? I think not. I think it would be a violation of the whole rule of correspondence and of the plain meaning of the term confidential. The argument is, that it was intended to leave entirely to Mr. Curtis's discretion the exhibition or communication of the letter, or its contents. But that is the very thing which it seems to me the defendant intended expressly to prevent. He was not willing to leave it to his agent's discretion, but meant distinctly to restrain him as to the use to be made of his communication. The contents of the letter would not give a different force and effect to the word from that, because they give a detail, at great length, of the affairs of Thompson & Co., of their pecuniary arrangements, of their attempts to sustain their credit by the negotiation of bonds in England, and an opinion that T. & Co. had invested too much money in the factories, &c. These details, if they do not strengthen, certainly do not impair the effect and force of the word "confidential." Looking at the letters themselves, therefore, I cannot see on the face of them any thing to authorize Mr. Curtis to exhibit the letter of the 7th of April to Mr. Iasigi or others. *And here be it remembered, that Mr. Brown did not know that Mr. Curtis wrote his letter at the request of the plaintiffs or any other party.*

Now looking at the extrinsic circumstances or evidence of other facts, let us see if either court or jury can be

authorized by them to give a different construction to the letter. The first evidence is that of Mr. Curtis, the first witness called for the plaintiffs. What are the jury authorized to find from any facts he has testified to? His testimony in every part of it goes to show that he had no authority out of the letter itself, to exhibit it. He negatives the contrary altogether. He states that he considered it confidential, and not to be communicated. But if he had stated the reverse, his considering that he had the authority would not make it so. He says, that at the request of Mr. Iasigi he exhibited the letter to him, stating to him distinctly that it was a confidential letter. It has been contended in argument that the jury would be authorized not to believe this, because in the former deposition of Mr. Curtis he makes no mention of such statement. Perhaps this is not a material fact to inquire into now. But the moment the plaintiff put his eye upon the letter he saw at once that it was confidential on the face of it. He must have seen it, in the very first line. On Mr. Curtis's testimony, therefore, there is nothing to control the force and effect of the letter itself — as claiming to be confidential.

The next evidence is that given by Mr. Grant, and here the same remarks apply. The jury have authority to find every thing he states as to the interview to be true. They may find every thing for the plaintiffs that the witness testifies to, but the court must decide what would be the force and effect of such facts. Now on his evidence it might be found that Mr. Iasigi, Mr. Grant, and Mr. Kendall, all creditors of Thompson & Co. or the factories, called on the defendant in New York, stating through Mr. Iasigi, that they had sold their merchandise on the faith of the letter of the 7th of April, and had come to claim from the defendant, a participation in the effects of the debtors, on account of the moral obligation the defendant was under, from his position with regard to all parties, to allow them to come in and participate. Thereupon a discussion was had; both letters were spoken of and referred to. Copies of the letters were in the possession of these gentlemen — Grant swears that he had a copy — and they must also be presumed to be known to the defendant, for they were alluded to by all parties; by Brown the defendant and by his partner, as well as by Iasigi and the others.

Now as to what was said or omitted to be said in this interview. It is argued for the plaintiffs, that the omission

to claim that the letter of the 7th of April was confidential, and his silence on that subject was, in effect, an admission by the defendant that it was not confidential, and may be so taken by the jury. Let us look at that. The claim then made was only of *a moral obligation* — and the only expression of the defendant's relied on by the plaintiffs is his statement that the letter was a guarded one; the question of confidence was not mooted — not alluded to at all — and the question for consideration is, whether, if the defendant in conversation omits to state that the letter contains something which we find in it, that is an admission that the letter does not contain it; or, in other words, if, in a conversation held in October upon a letter written in the preceding April, the party omits to state that it contained a certain statement, he thereby intended to convey that it did not contain such statement.

It seems to me that this ground cannot be maintained; that a party, conversing with another who has a copy of the letter in question and knows what it is, cannot, from an omission to cite any particular of that letter, be held to an admission that the letter does not contain such particular. Here was a claim urged upon a *moral obligation;* and so considering it, defendant might not have thought it necessary to advert to the confidential character of the letter, whereas he might well have done so, had it been a question of legal liability. There is a difference between the two; and it may very well be that a party, in a conversation placed distinctly on the one ground should employ different terms from those he would have used, had he been called upon, on another or opposite ground. Taking the conversation as it was, it is in proof that the defendant declared the letter to be a guarded one. Now the plaintiffs contend that the meaning of this is, that the letter was carefully worded and guarded, so as to protect himself (the defendant). The plaintiffs say that the jury are entitled to draw this conclusion. Suppose it to be so; may not the making of the letter confidential have been one of the guards he had reference to in the conversation? May he not have intended it as such? But again, suppose that he was speaking of the contents of the letter. The plaintiffs' argument assumes that a person does not write a guarded letter, meaning and intending it to be a confidential one; but that when one writes a confidential letter, it will be a free statement of facts or opinions inconsistent

with the import of the word "guarded." That is, that in this, or a similar case, the very declaration by the writer, that his letter was, or was meant to be a guarded one, overthrows the presumption that it was confidential. This suggestion may be of some force as to mere letters of friendship, but not as to matters of business. I see no inconsistency in declaring the letter to be guarded, and at the same time holding it to be confidential. A principal may be guarded in his statement to his agent and may write cautiously, in order that *he* may not be misled, but that does not show that it may not be also confidential.

We next come to the letters of the 26th and 27th June; they also must be for the construction of the court. It is argued that the letter of June 27th shows of itself, in its language, that the other letter, of April 7th, was not intended to be confidential, but, on the contrary, was meant to be read or shown. Mr. Curtis, in his letter of June 26th, says: — "A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Co. I replied, that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool and wish to continue to do so." In answer to this, the letter of 27th of June, says: — "We continue to have a favorable opinion of the concerns you allude to." Now the question is, whether that goes to show that the former letter was not meant to be confidential, and to show that Mr. Curtis had authority to exhibit it.

There is no reference whatever in the letter of June to that of April, and can any body say, that this letter of the 27th of June says to Mr. Curtis, that when he received the letter of April 7th he was then at liberty to exhibit it, or is now at liberty to show it? It seems to me the merest conjecture to infer, that Brown, Bro's & Co's letter of June 27th had any reference to that of the 7th April, and still more, that it meant to convey any authority to Mr. Curtis, the agent, to show the first letter. The defendant had no reason whatever to suppose that, in point of fact, up to that time, Mr. Curtis had exhibited the first letter to any body. Nothing was said in any of the correspondence leading to such an inference on his part; and now, on this state of things, can it be, that this letter of the 27th of June gave him authority to exhibit the letter of April 7th? I cannot

think that such would be a safe ground of judicial proceeding, in determining the rights of the parties.

I have thus considered all the evidence as yet put in, and now proceed to consider what is *proposed* to be proved. And this I deem of more importance and force than any thing to which I have before adverted. What is proposed is this — to show that in the letter of the 7th of April there were various statements going to sustain the credit of said parties, which were not true, and that the defendant at the time knew that they were not true, and that he omitted or suppressed facts which he knew to be material; and further, that when doing this, he, as a large creditor, had an interest to sustain the credit of Thompson & Co. and the factories, and to procure for them further credit in the community.

From all this, if proved, the court or jury might doubtless infer that it was the intention of the writer to sustain the credit of the Thompsons, and that his letter should in *some* manner be operative to that end. But in what manner? The counsel for the plaintiffs insist that it must have been by exhibiting the letter to third persons. Their argument assumes that this is the only mode in which the letter could operate to sustain the credit of the Thompsons. But is it the only mode? Is there not another? less effective indeed in giving a false credit, but still conducive to that end, and more safe to the writer, and more in accordance with his expressed purpose of withholding his name and shielding himself from responsibility to others. It is to be borne in mind that his letter was not volunteered. It was drawn from him by a direct interrogatory put by the letter of Mr. Curtis. He was not informed that this was written at the request of any other person, or that Mr. Curtis would be under the necessity of saying to any one, that he had or had not received a communication upon this subject from the defendant. Mr. Curtis put the inquiry as his own, with an assurance that the opinion which might be given in response should be used discreetly by himself. This implied that it would be entirely within his control and discretion. If the defendant had refused to make any answer to Mr. Curtis, that might of itself have been injurious to the credit of the Thompsons. All that the occasion required, so far as he knew, was to satisfy the mind of Mr. Curtis, so that the credit of the concern should not suffer in his mind, or through the opinions that he might express; and this would be accomplished by a confidential letter to

Mr. Curtis, stating such facts and opinions as would convince him, and at the same time prohibiting him from giving the name of the writer as his authority. The letter would thus be operative to sustain the credit of the concerns so far as Mr. Curtis should personally have business with them, and so far as he should express his own opinions to others. This was all that there was any apparent occasion for the defendant then to do, and if the statements in the letter were designedly false as the plaintiffs insist, and as we must for the purposes of the present question take them to be, that of itself might be a strong reason, why he should be unwilling that his name should be disclosed, and should prohibit this correspondent from subjecting him to responsibility to others.

Let us here recur to the main question. The court is called upon to give a construction to this letter, and to declare, whether it authorized Mr. Curtis to exhibit it to the plaintiffs. It contains language clearly prohibiting such exhibition. The plaintiffs insist that such prohibition is incompatible with extrinsic facts, and therefore to be disregarded. The burden is upon the plaintiffs to show the incompatibility. This they have not been able to do; on the contrary, it appears that all the facts which could be found by a jury, admit of a fair and rational solution, in perfect harmony with the language of the letter. There is nothing which can authorize the court to annul or disregard the distinct and positive prohibition which it contains. The exhibition of the letter therefore was not authorized by the defendant. Here another question may arise. It may be contended, that although the letter was not intended to be shown, yet that it was intended to give a false credit to the Thompson concerns, by impressing Mr. Curtis with an erroneous opinion, and by his expressing such opinions to mislead others; and that the plaintiffs have in fact been misled, and given credit to their injury. To this it may be answered, in the first place, that although it may have been intended to have given a false credit, and that Mr. Curtis should express his own opinion to that end, yet this was not in fact done, and what was done was not authorized. No one can say that if Mr. Curtis had merely expressed his own opinion, the plaintiffs would have given the credit. When Mr. Iasigi went to Mr. Curtis, it was not for *his* opinion, but to obtain that of the defendant, because, as is expressly alleged in the declaration, he knew

that the defendant was conversant with the Thompson concerns; and the plaintiffs have from the beginning relied solely on the exhibition of the letter, as the ground upon which they made the sales. They did not give credit upon any act authorized by the defendant. Whether if Mr. Curtis had done what he was authorized to do, merely expressed his own opinion, the plaintiffs would have given the credit, is mere matter of speculation and conjecture, which cannot be the basis of a judicial determination. In the second place, by the Revised Statutes of Massachusetts, ch. 74, sect. 3, it is provided that no person should be liable for any representation of the credit of another, unless such representation shall be in writing, and signed by him, or by some person by him lawfully authorized. Now if the plaintiffs had had only a verbal representation from Mr. Curtis, as the expression of his own opinion, the statute would have interposed an obstacle to the plaintiffs' recovery.

The result is, that the evidence which has been introduced and offered is not legally sufficient to maintain this action, and the jury must be instructed to return a verdict for the defendant.

R. Choate, S. Bartlett, for plaintiffs.

C. G. Loring, E. Merwin, for defendant.

District Court of the United States, Dec. 24 & 26, 1853.

ENOCH CRABTREE *v.* ALBERT P. CLARK ET AL.

THIS was a libel for damages in the nature of freight. The libellant, by a charter-party, agreed with respondents to receive on board the brig Carniola, of which he was master, at Buen Ayre, a cargo of salt, and to bring it to Boston. The respondents stipulated "to furnish at Buen Ayre a full cargo of salt," and to pay freight upon it at fourteen cents per bushel. In addition to the above, and the other stipulations usual in such contracts, the charter-party contained the following: — "It is further understood and agreed that the master is to use the vessel's funds in payment for salt, which he is to purchase at the lowest cash price, and on vessel's arrival at Boston, the charterers are to pay the master or his agent the invoice cost of salt, export duty if any, and insurance on amount invested in purchase of salt from Buen Ayre to Boston and Boston wharfage, all in addition to the freight."

The Carniola went to Buen Ayre, furnished with funds to buy a cargo, but there was no salt there, and after remaining twenty-four hours, she left and proceeded to Boston in ballast. This action was brought to recover damages of the respondents, for their failure to furnish a cargo.

The respondents contended, 1st, that the libellant's engagement to purchase the cargo should be construed as a condition precedent to their own obligation to pay freight. 2d, that assuming that the respondents had contracted without limitation to furnish a cargo of salt at Buen Ayre, the libellant should have remained there a reasonable time, for them to perform this contract, and could not otherwise charge them without damages for an alleged non-performance. 3d, that assuming that the libellant was under the contract to be regarded as the agent of the respondents for the purchase of salt at Buen Ayre, yet, that failing to find salt there, his agency was enlarged from necessity, and required him to endeavor to buy salt at Curacoa or any other place or island where he conveniently could.

Judge Sprague held that the respondents had broken their contract, in failing to furnish a cargo; that the libellant's obligation to invest the vessel's funds in the purchase of a cargo was not broken by his failure to do so, unless there was salt at Buen Ayre to be purchased; or, in other words, that by the proper construction of the charter-party, the respondents were to be regarded as taking the risk of there being salt at Buen Ayre. That the libellant was not bound to remain at Buen Ayre longer than he did, unless there was some ground to expect that a cargo might be procured by longer delay, and that from the evidence in this case it was apparent that longer delay would have been useless; that if cargo of any kind could have been procured at Buen Ayre to be brought to Boston as freight, the libellant would have been bound to take it, that the proceeds might diminish the damages, for which the respondents were liable; but that he was not bound to purchase a cargo on his own risk, or to go to Curacoa, or any other port, in pursuit of business, and thus by a deviation endanger his insurance. Decree, for the libellant for $1,296.61.

J. C. Dodge, for the libellant; *C. B. Goodrich* and *T. K. Lothrop*, for the respondents.

Supreme Judicial Court of Massachusetts, Middlesex, October Term, 1852.

COMMONWEALTH *v.* SAMUEL J. VARNEY.

Libel — Indictment — Evidence — Variance.

An indictment for libel need not contain any description of the person alleged to have been libelled, as to his calling, profession, or place of residence.

An indictment for libel, alleging that the libel was contained in a newspaper called the "Lowell Courier and Journal," printed and published by the defendant on a specified day, is sustained by evidence of a libel published in that newspaper at any time within the statute of limitations.

THIS was an indictment, which alleged that the defendant, at Lowell, "on the twenty-first day of November, in the year eighteen hundred and fifty-one, contriving and unlawfully and wickedly intending to injure, vilify, and prejudice Benjamin F. Butler, did print and publish a certain false, scandalous and malicious libel, of and concerning the said Benjamin F. Butler, in a certain newspaper, then and there published and extensively circulated, called 'Lowell Courier and Journal,' in a certain part of which newspaper and publication there were and are contained the following false, wicked, and scandalous matters of and concerning said Benjamin F. Butler;" (setting forth the libel at large.)

At the trial in the Court of Common Pleas, before *Hoar*, J., the defendant moved the court to quash the indictment, because it did not contain any description of Benjamin F. Butler, as to his calling, profession, or place of residence. But the Judge refused so to do.

The District Attorney offered to the jury, as evidence of the libel, an article contained in a newspaper called "Lowell Courier and Journal," purporting to have been printed and published by the defendant on the 19th day of November, 1851. To this evidence the defendant objected, because the indictment alleged the libel to have been contained in a newspaper called "Lowell Courier and Journal," published and printed by the defendant on the 21st day of said November. But the judge admitted the evidence. The jury found the defendant guilty; and he alleged exceptions.

T. Wentworth, for the defendant.

Choate, (Attorney General) for the Commonwealth.

METCALF, J. The exception taken to the refusal of the court to quash the indictment must be overruled. The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed. 2 Hale P. C. 182; 1 Chit. Crim. Law, 211.

The exception taken to the admission of the newspaper in evidence must also be overruled. The defendant insisted that, as the indictment alleged that the libel was published by him on the 21st of November, in the "Lowell Courier and Journal," evidence that it was published by him in a newspaper of that name, bearing date November 19th, did not support the indictment; that there was a variance between the allegation and the proof. But there was no such variance. Even if it had been necessary, in order to sustain the indictment, to prove that the defendant published the libel on the day alleged, yet that fact might well be proved by showing that he published, on that day, a libel contained in a newspaper dated and issued on an earlier day. And the exception does not show that the proof did not exactly conform to the allegation. But it was not necessary to prove that the libel was published on the day alleged. Proof that it was published at any time within the statute of limitations, was sufficient to sustain the indictment. Archb. Crim. Pl. (5th Am. ed.) 116; 1 Stark. Crim. Pl. (2d ed.) 61; 11 Met. 574; 3 McLean, 89. If the indictment had alleged that the libel was published in a newspaper called "Lowell Courier and Journal," bearing date November 21st, proof that it was published in a newspaper of that name bearing date on any other day, would not have supported the indictment. The date would have been matter of description; and it would have been as necessary, in order to avoid a variance, to prove a publication in a newspaper of that date, as in a newspaper of that name. But the indictment, as drawn, was sustained by the evidence excepted to. 2 Gabbett Crim. Law, 227; *Coxon* v. *Lyon*, 2 Campb. 307, *note;* 2 Greenl. Ev. § 12.

Exception overruled.

Recent English Decisions.

Court of Queen's Bench.

Sittings in Banc after Trinity Term, June 25, 1852.

Hochster *v.* De Latour.[1]

Agreement to Employ on a Future Day — Breach before that Day — Right of Action before that Day — Damages.

Declaration stated, that in consideration that plaintiff would agree to enter into the service of defendant as a courier on the 1st June, and travel with him on the Continent of Europe, as a courier, for three months, and to be ready to start with defendant on such travels on the said day, for a certain monthly salary, defendant agreed to employ plaintiff, on and from the 1st June, for three months, to travel with him on the Continent of Europe, and to start on such travels with plaintiff on that day, and to pay him the said monthly salary during the continuance of such service. Averment of readiness and willingness of defendant to perform the agreement. Breach, that defendant, before the 1st June, wholly refused to employ plaintiff in the capacity aforesaid, and wholly discharged plaintiff from his agreement, and from being ready and willing to perform it; and defendant wholly broke, put an end to, and determined his promise and engagement. On motion in arrest of judgment, held, that plaintiff was entitled to commence an action before the 1st June, to recover damages for breach of the agreement.

In assessing the damages, the jury would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of the trial.

The declaration stated, that heretofore, to wit, on the 12th April, 1852, in consideration that the plaintiff, at the request of the defendant, would agree with the defendant to enter into the service and employ of the defendant in the capacity of a courier, on a certain day then to come, to wit, on the 1st June, 1852, and to serve the defendant in that capacity, and travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit, at and after the rate of 10*l.* for each and every month of such service, to be therefor paid by the defendant to the plaintiff; the defendant then agreed with the plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier, on and from the said

[1] 17 Jurist, 972. This case will be in the "English Law and Equity Reports," Vol. 20.

1st June, 1852, for three months certain, from the day and year last aforesaid, to travel with the defendant on the continent of Europe as a courier, and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay to the plaintiff, during the continuance of such service and employment, for the same, the said wages or salary of 10*l.* for each and every month of such service; and the plaintiff avers that he, confiding in the said agreement and promise of the defendant, did then, to wit, on the day and year first aforesaid, agree with the defendant to enter into the service and employ of the defendant, in the capacity aforesaid, on the 1st June, 1852, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary last aforesaid. That from the time of the making of the aforesaid agreement, and of the said promise of the defendant, until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement, as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant in the capacity aforesaid, on the day aforesaid, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier, for three months certain, from the day and year last aforesaid, and to start with the defendant on the day and year aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would on the said day have entered into the said service and employ of the defendant in the capacity, upon the terms, and for the time aforesaid; of all which said several premises the defendant always had notice and knowledge; yet the defendant, not regarding the said agreement and promise, afterwards, and before the 1st June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the 1st June, 1852, for three months, or on, from, or for any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and

then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his, the plaintiff's part, and from being ready and willing to perform the same on his, the plaintiff's, part, and the defendant then wrongfully wholly broke, put an end to, and determined his said promise and engagement, whereby, &c., to the plaintiff's damage 100*l.* The action was commenced on the 22d May, and on the trial, before Erle, J., at the Sittings at Guildhall in Easter Term, it was contended that the action was not maintainable until the 1st June, as the contract could not be put an end to without the consent of both parties. The learned judge held, that the determination of the relation of contracting parties was the cause of action; and a verdict was given for the plaintiff, damages 20*l.* On a subsequent day in the same term, (April 25),

Hugh Hill obtained a rule nisi to arrest judgment, citing Dallas, C. J., in *Leigh* v. *Paterson*, (2 J. B. Moo. 588); Parke, B., in *Philpotts* v. *Evans*, (5 M. & W. 475); and *Ripley* v. *Maclure*, (4 Exch. 345, 358, 359).

In this term,[1]

Hannen shewed cause.—The question is, whether, in the case of a contract to be performed on a future day, one party can renounce or put an end to it before that day has arrived, so as to give an immediate cause of action to the other party. In *Leigh* v. *Paterson*, (2 J. B. Moo. 588,) the defendants had contracted to deliver tallow "in all next December," at a certain price, and the question was as to the estimate of the damages. *Philpotts* v. *Evans*, (5 M. & W. 474,) was a similar case, and was decided upon the authority of *Leigh* v. *Paterson*, Parke, B., observing that the defendant's "contract was not broken by his previous declaration that he would not receive the goods." In *Ripley* v. *Maclure*, (4 Exch. 345), Parke, B., in delivering the judgment of the court, said, (p. 359,) "If the jury had been told that a refusal *before the arrival of the cargo* was a breach, that would have been incorrect;" but he did not mean to say that there might not be a final abandonment of the contract before the arrival of the cargo, because it appears that he considered, that if the party who received notice of the intention of the other party not to comply

[1] June 10, before Lord Campbell, C. J., Coleridge, Erle and Crompton, JJ.

with the conditions of the contract had acted upon it, such refusal would have been final. [CROMPTON, J. — The pleadings in that case were most intricate, and very difficult to be understood.] But not that part of them on which this question arose. In *Cort* v. *The Ambergate, Nottingham, Boston, and Eastern Junction Railway Company*, (15 Jur. 877, S. C. 6 English Law & Equity Rep. 230,) this court commented on *Philpotts* v. *Evans* and *Ripley* v. *Maclure*. In the case of a contract to marry a woman on a certain day, if the man marries another woman before that day, an action may be maintained before the expiration of time for performing the contract. *Short* v. *Stone*, (8 Q. B. 358; 10 Jur. 245.) So, if a man contracts to sell an estate on a certain day, and he conveys the estate away before that day; *Lovelock* v. *Franklyn*, (8 Q. B. 371; 10 Jur. 246); and the ground upon which an action lies against a party, if he disables himself from performing his contract, is, that he has renounced his contract. [He also cited *Wild* v. *Harris*, (13 Jur. 961,) and *Planchè* v. *Colburn*, 8 Bing. 14).] According to the terms of the contract, there is a readiness and willingness to perform it at all times; though it is not every expression of unwillingness to perform the contract which would give a cause of action. The party, by renouncing his contract, says to the other party, "You may consider the contract as broken;" and if he afterwards changes his mind, and desires to act upon it, it is reasonable that the other party should be permitted to answer that he has treated the contract as at an end. In the note to *Cutler* v. *Powell*, (2 Smith's L. C. 20, 1st ed.) it is said, that a servant who is wrongfully dismissed may recover the whole of his wages in an action of indebitatus assumpsit, if the action is brought after the expiration of the term for which he was hired. But in many cases that count would not include the special damage arising from the expenditure of money which the party had incurred in preparing to complete the contract; and the plaintiff need not wait to the end of the time in order to ascertain the measure of damages. It is analogous to the case of a servant dismissed from the service.

Hugh Hill and *Deighton*, contra. — If a party to a contract puts himself under a legal incapacity to perform it, there is no necessity to request him to perform it before bringing an action; but where a party merely refuses to

perform it, though such refusal may be evidence, by continuous non-performance, of a breach of contract, the contract is not broken before the time within which it is to be performed has expired, and therefore the party must wait until that time before he brings his action. [Coleridge, J. — Suppose one party on the 1st May gives the other party notice that he will not perform his contract on the 1st June.] If the plaintiff had engaged himself elsewhere, it would have been evidence that he had dispensed with the performance of the contract. [Erle, J. — In that case, suppose that the party who had given the notice calls upon him on the 30th May to go with him, could he bring an action against him? Coleridge, J. — A contract for personal services is dependent upon both parties living. Suppose an action in the County Court on the 15th May, and the plaintiff died before the end of the month. Lord Campbell, C. J. — I suppose the judge or jury would take into consideration the possibility of the death of the party.] Where the contract is, that the party shall have the benefit of it on a particular day, no cause of action arises until that day. A breach of contract is, where the party to it has neglected to do something which under the contract he was bound to do at that particular time; but in this case the defendant was not bound to do any thing on the 22d May, when the action was commenced. In *Cort* v. *The Ambergate, Nottingham, Boston, and Eastern Junction Railway Company*, (15 Jur. 877; S. C. 6 Eng. Law & Eq. Rep. 230,) the action was not brought until after the time had expired for the delivery of the goods under the contract, and the question arose on the averment of readiness and willingness; and that case only decided, that, after notice that no more goods would be wanted, the plaintiff was not bound to make them and tender them, and might maintain an action without having manufactured them; in fact, he was to be considered in the same situation as if he had manufactured them.

Cur. adv. vult.

Lord Campbell, C. J., now delivered the judgment of the Court. — On this motion in arrest of judgment the question arises, whether, if there be an agreement between A. and B., whereby B. engages to employ A., on and from a future day, for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a

monthly salary during the continuance of such service, B. may before the day refuse to perform the agreement, and break and renounce it, so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement, A. having been ready and willing to perform it, till it was broken and renounced by B.

The defendant's counsel very powerfully contended, that if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as an universal rule, that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promise to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short* v. *Stone*, (8 Q. B. 358; 10 Jur. 245.) If a man contracts to execute a lease on and from a future day for a certain term, and before that day execute a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford* v. *Tilley*, (6 B. & Cr. 325; 9 D. & Ry. 448.) So if a man contracts to sell and deliver goods on a future day, and before that day he sells and delivers them to another, he is immediately liable to an action at the suit of the person to whom he first contracted to sell and deliver them. *Bowdell* v. *Parsons*, (10 East, 359.) One reason alleged in support of such an action is, that the defendant has before the day rendered it impossible for him to perform the contract at the day; but this does not necessarily follow, for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease might be obtained, and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that when there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one

another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin they were engaged to each other, and it seems to be a breach of implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Elderton* v. *Emmens*, (6 C. B. 160,) which we have followed in subsequent cases in this court.

The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which renders it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows, that till then he must enter into no employment which will interfere with his promise "to start on such travels with the plaintiff on that day," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle, and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract.

It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely

renounced it. Suppose that the defendant at the time of his renunciation had embarked in a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852, according to decided cases the action might have been brought before the 1st June; but the renunciation may have been founded on other facts to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer.

An argument against the action before the 1st June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st September, when the three months would expire. In either case, the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial.

We do not find any decision contrary to the view we are taking of this case. *Leigh* v. *Paterson*, (2 J. B. Moo. 588,) only shews, that upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered.

If this was a sale of specific goods, the action, according to *Bowdell* v. *Parsons*, (10 East, 359,) might have been brought before that time, as soon as the vendor had sold and delivered them to another. *Philpotts* v. *Evans*, (5 M. & W. 475,) was a similar case, and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat; the court very properly holding that the plaintiff was entitled to damages according to the state of the market when the

wheat was to be delivered, the court professing to proceed upon the rule laid down in *Startup* v. *Cortazzi*, (2 C., M., & R. 165,) where no question arose as to the right to bring an action before the stipulated day of delivery, on a renunciation of the contract. Parke, B., whose dicta are entitled to very great weight, certainly does say in *Philpotts* v. *Evans*, with reference to the notice by the defendants that they would not accept the corn, "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendants would then receive it." But the learned judge might suppose that the notice did not amount to a renunciation of the contract; and if he thought that after such a renunciation the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss on tendering the wheat before they could have any remedy on the contract, we cannot agree with him.

In *Ripley* v. *Maclure*, (4 Exch. 345,) it is said, that under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract; but the court intimated no opinion upon the question, whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract; and they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to and inclusive of the time when the act was to be done.

The only other case cited in the argument which we think it necessary to notice, is *Planchè* v. *Colburn*, (8 Bing. 14,) which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise, but before he had completed it, and before the time when, in the course of conducting the publication, it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed, tendered, and delivered the treatise ac-

cording to the contract. Tindal, C. J., said, "The fact was, that the defendants not only suspended, but actually put an end to, the 'Juvenile Library:' they had broken their contract with the plaintiff." The declaration contained counts for work and labor; but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus showing that in the opinion of the court the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it.

If it should be held, that upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action; and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect, that, the question being on the record, our opinion may be reversed in a Court of Error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.

Miscellaneous Intelligence.

LAWS, OATHS, &c. IN ABYSSINIA. — "As for the laws of the country, they are for the most part formed on the basis of the old Mosaic dispensation: 'An eye for an eye, and a tooth for a tooth' is followed nearly to the letter, — so much so that, as we have before said, if a man kill another, the murderer must be put to death by the nearest relatives of the deceased, with precisely the same kind of weapon as that with which he killed his victim.

To exemplify this custom: Two little boys were playing in the woods near a village. Wandering about, they chanced to see a tree called 'owleh,' on whose branches were a quantity of ripe wild fruit. The fruit is not very delicious, not more so than the hips and haws found on our hedges: yet any one who can remember the pleasure with which, in his boyish days these berries were collected and eaten, will excuse our young heroes when I relate how, having looked upon the fruit, they longed for it. But though the 'owleh' is not usually of very large

growth, still the lowest branches were above their reach. To climb the tree was an arduous task, for these children were but of the ages of eight and five. The temptation, however, proved superior to the obstacles, and the elder boy with some difficulty succeeded in reaching the desired object. Higher and higher he mounted, till at last he stood on a bough from which he could gather the best fruit, and then with what feelings of joy and pride at his superior age and prowess did he help himself and throw down a supply to his little companion! But 'pride must have a fall!' and whether in this case it was brought about by the bough's breaking or his foot's slipping I cannot well remember; but, however it may have been, the adage proved true, and down came our climber right on the head, and nearly down the throat of his little comrade, who happened at that moment to be standing with upturned eyes and expectant mouth, waiting a fresh shower of the golden berries. The elder lad got up unhurt beyond a few bruises, but, to his horror, his friend rose not from the ground. He shook him, spoke to him, pinched him; but all to no purpose. The little fellow was dead!

The elder child, shocked and frightened at having so unwittingly caused his companion's death, ran blubbering home, and told his mother all about it. The story got wind in the village, and the parents of the deceased child brought home the body and set up howling and lamenting over it. Moreover, nothing would satisfy them but that the elder boy should be put on trial for his life, as having been the cause of the other's death. This they urged in the hope, no doubt, of a compromise in money from his family, or, in other words, making the best they possibly could of a bad business.

The trial was long; but after much examination of the different books and many opinions taken of the wisest men in the country, it was ultimately concluded that of a truth the boy was guilty of death.

But how was he to be killed? Why, of course, as he had killed the other; so, in fact, the sentence was, that the dead boy's brother should climb the tree and tumble down on the other's head till he killed him. This, however, did not suit the deceased's mother's feelings; for, thought she, 'If I consent to this, perhaps my other boy may die or injure himself in his fall more than him whom he has to kill.' So she preferred letting the culprit off to risking the life of her only surviving son.

This story may appear a caricature. All I can say in favor of its credibility is, that I heard it related by a highly respectable individual, in a large party, where I was the only man not an Abyssinian, and the only person who appeared to consider it as at all improbable."

"I have occasionally spoken of persons taking oaths in law cases. Among the Christians of Abyssinia it is not uncommon to settle a dispute about money matters (such as small debts or other affairs) when no witnesses can be produced, by one party's swearing to the validity of his claim. Even kings or chiefs, by a very solemn oath, confirm their promises of pardon to a rebel who may offer to return to his allegiance; but occasionally, as we have seen in a former chapter, promises, though thus consecrated, are broken through to suit the purposes of ambition, cupidity, or revenge.

There are many forms of swearing; one of which, considered as very binding, is called 'Medammed.' In taking this oath the swearer lights a little straw, which is placed in his hand on a layer of cow-dung. When the straw is well ignited he extinguishes it by pouring water over it, and at the same time expresses a wish that his family may be burnt, and their memory blotted from the face of the earth for seven generations, if he should violate his promise.

Others swear by the sword. Unsheathing one, they pray that, as surely as it is thus drawn in witness of their word, so surely may the holy Archangel St. Michael draw his to their destruction if that word should prove false. Similarly also by a gun or other weapon. Others again, by the picture of St. George, placing their hands on his likeness, and calling upon him that, should they prove faithless, he should direct his lance against them as formerly against the dragon.

But the most impressive and solemn oath is that which is taken in the church, when, for some important question, a man's opponent requires of him to be sworn in that holy place. The man is taken into the outer circle of the church to the place where the bodies of the dead are laid previously to burial. He is there stretched on one of the mats which (as I have described) are used instead of coffins. Lying there, he makes his asseveration at the moment when the Sacrament is being distributed, and calls upon the Almighty to record it, and to grant as a testimony that, should he have sworn falsely, he may return, after the space of three days, or seven at the most, to the mat on which he is lying, never to leave it more.

It is, however, always considered a rather disgraceful action to call thus upon the Lord, or even on his saints in matters of 'filthy lucre,' although, indeed, the cause be a just one, so much so, that many persons possessed of a good reputation, which they are scrupulous of in any wise sullying in the event of being required to pay an unjust debt, or even an imaginary one, would place the amount in the hands of some trustworthy person, to be paid over to the claimant should he choose to perjure himself, preferring rather to risk their money than to be obliged to swear even to the truth.

Perjury is most justly looked upon as a horrible crime in this country as elsewhere. A man convicted of it, would not only lose his reputation, and be forever incapacitated from being witness, even on the most trivial question, but he would likewise, in all probability, be bound and severely fined, and might, indeed, think himself fortunate if he got off with all his limbs in their proper places, or without his hide being scored by the 'giraffe' to the pattern of a leg of roast pork." — *From "Life in Abyssinia, being Notes collected during Three Years' Residence and Travels in that Country."* By MANSFIELD PARKYNS. *London: John Murray, Albemarle Street.* 1853.

WE have not ourselves examined the work of Mr. Bishop noticed in the present number. But we are led to believe on better authority than our own that it is a work of merit. Nor are we now prepared to adopt all the opinions and statements of the writer of the article, especially with regard to the subject of modified divorces. This is not the place to discuss the scriptural argument as to the propriety of divorces, for any cause except that prescribed by the New Testament. But what Mr. Bishop calls "a compromise between good sense and sound doctrine," may deserve that appellation in no ironical signification.

We have received a communication from Judge Walker of Cincinnati, relative to the Martha Washington case, too late for insertion in this number, which will be noticed in the next. We are obliged also by a press of matter to defer other articles of interest.

Notices of New Books.

AN ESSAY ON THE LEARNING OF FUTURE INTERESTS IN REAL PROPERTY By WADE KEYES, of the Montgomery Bar, Montgomery, Ala. Printed by J. H. & T. F. Martin, 1853. pp. 160.

This is a brief but compendious work on a difficult part of legal science. It plunges at once into the subject, analytically and logically examines the doctrines of the Common Law applicable to Future Interests in real estate, and, so far as we have been able to see by a perusal of portions of the book, with admirable clearness and with pains-taking exactness. We agree with the author that the student of this branch of the law, looks in vain to the great masters of the profession to find it all set forth in any single work in that general and comprehensive manner that satisfies his wants and rewards his assiduity. Kent, Blackstone and Fearne cannot of course be superseded or neglected, nor does the author claim any more than that his work may be viewed as a sort of supplement to theirs, and one which may be profitably read as a review by the student after he has acquired a general idea of the doctrines of Real Property. In this light we can cordially recommend the Essay as a valuable auxiliary to the thorough acquisition of an important matter, and not less useful to all who have to grapple in the practice of their profession with the proverbial intricacies of Remainders, Reversions and Limitations.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bacon, David A.	Barre,	Dec. 9,	Charles Brimblecome.
Baker, Nathan	Dennis,	Nov. 17,	Timothy Reed.
Barker, Albion	Roxbury,	Dec. 15,	Francis Hilliard.
Blackington, Wm. H. et al.	Attleborough,	" 20,	Asa F. Lawrence.
Bradford, Edwin S. et al.	Braintree,	" 13,	Francis Hilliard.
Brown, Francis C.	Lincoln,	" 3,	Asa F Lawrence.
Burnham. Ezra H.	Newton,	" 28,	Asa F. Lawrence.
Clark, Robert	Petersham,	" 30,	Charles Brimblecome.
Coburn, Edward O.	Boston,	" 2,	John M. Williams.
Conant, Calvin	Dennis,	Sept. 7,	Timothy Reed.
Dwyer, William T.	Boston,	Dec. 6,	John P. Putnam.
Eddy, Joseph	Swanzey,	" 15,	Edmund H. Bennett.
Fitch, George E. et al.	Hopkinton,	" 2,	Asa F. Lawrence.
Frazier, Joseph R. et al.	Braintree,	" 13,	Francis Hilliard.
French, Caleb	Woburn,	" 13,	Asa F. Lawrence.
Gould, William G. et al.	Attleboro,	" 20,	Asa F. Lawrence
Gregson, Thomas	West Boylston,	" 21,	Henry Chapin.
Harding, William B.	Boston,	" 21,	John P. Putnam.
Hill, Washington	Spencer,	" 28,	Henry Chapin.
Jenkins, Samuel W.	Bradford,	" 12,	John G. King.
Kimball, Daniel B.	Bradford,	" 13,	John P. Putnam.
Mason, John W.	Boston,	" 5,	John M. Williams.
McLaughlin, Francis	East Bridgewater,	" 14,	Welcome Young.
Meacham, George	Abington,	" 9,	Welcome Young.
Menzies, George G. et al.	Pawtucket,	" 19,	John P. Putnam.
Morrell, Benjamin R.	Somerville,	" 22,	Asa F. Lawrence,
Muzzy, Josephus	Leicester,	" 27,	Henry Chapin.
Norris, Lawrence B.	Lowell,	" 15,	Asa F. Lawrence.
Paine, Orlando J. et al.	West Cambridge,	" 14,	John M. Williams.
Pratt, Andrew et al.	Charlestown,	" 14,	John M. Williams.
Richards, Lucy C.	Boston,	" 27,	John P. Putnam.
Rogers, Robert S.	Lynn,	" 12,	John G. King.
Seymour, Charles Jr.	Marlborough,	" 13,	Asa F. Lawrence.
Shurtleff, Stephen H.	Wareham,	" 17,	Welcome Young.
Souther, William	Boston,	" 20,	John P. Putnam.
Tower, Daniel T. et al.	Boston,	" 19,	John P. Putnam.
White, Henry H. et al.	Boston,	" 19,	John P. Putnam.
Willard, Lyman	Cambridge,	" 27,	Josiah Rutter.